



No 295

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CHARLES ELMER SMITH  
CLERK

IN THE

**SUPREME COURT OF THE UNITED STATES**

**OCTOBER TERM, 1945**

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**CLOVERLEAF BUTTER COMPANY, a corporation,**  
*Petitioner (Claimant-Appellee Below)*

**vs.**

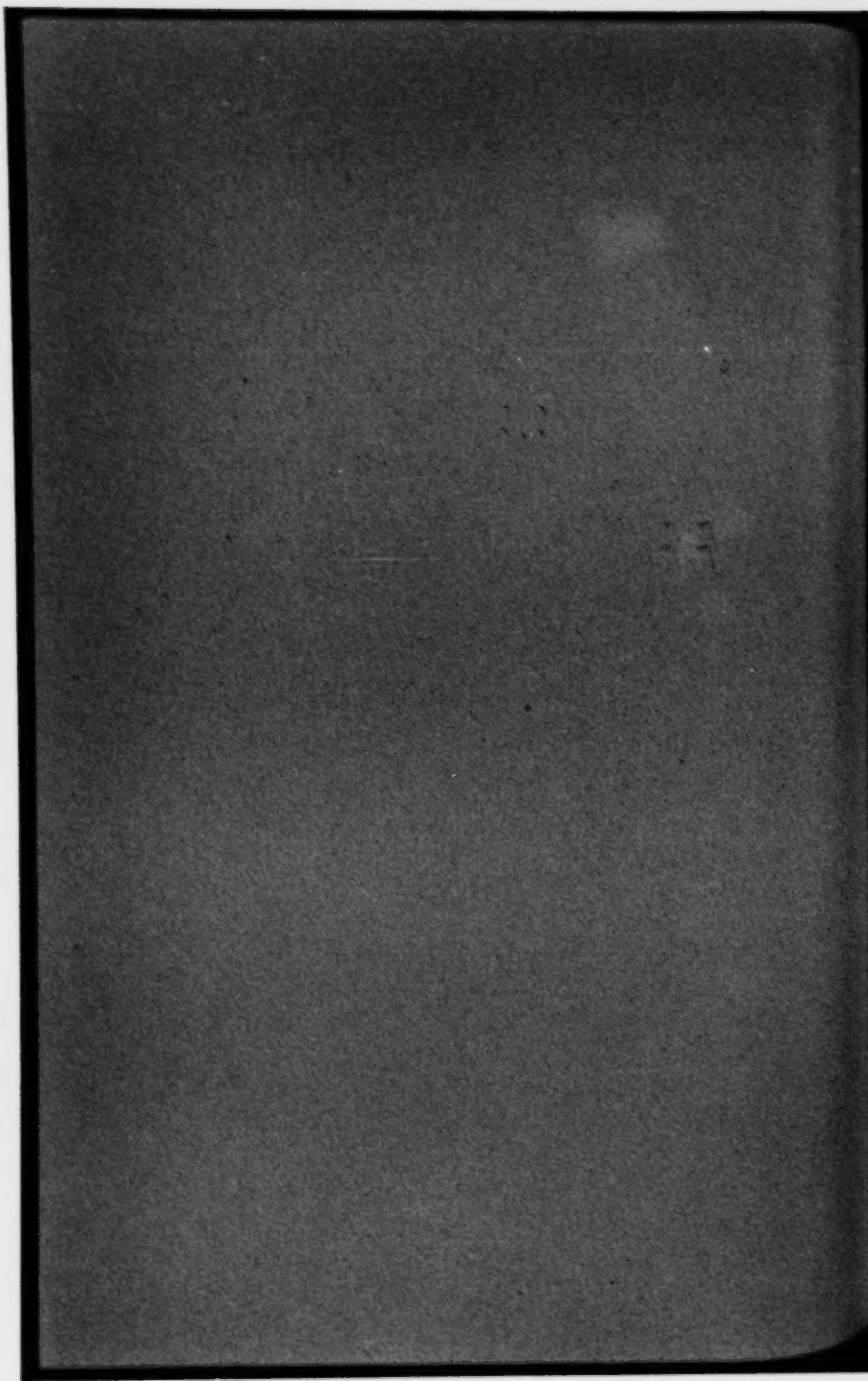
**UNITED STATES OF AMERICA**  
*Respondent (Appellant Below)*

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**PETITION FOR REHEARING FROM JUDGMENT  
DENYING PETITIONER'S PETITION FOR WRIT  
OF CERTIORARI TO UNITED STATES CIRCUIT  
COURT OF APPEALS FOR THE FIFTH CIRCUIT**

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**HORACE C. WILKINSON  
ERLE PETTUS  
VICTOR H. SMITH**  
**Birmingham, Alabama**  
*Attorneys for Petitioner*



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TO THE HONORABLE SUPREME COURT  
OF THE UNITED STATES:

Now comes the Petitioner, Cloverleaf Butter Company, a Corporation, and respectfully, but earnestly, prays this Honorable Court to grant Petitioner a rehearing from the order or judgment rendered on, to-wit, October 15th, 1945, denying Petitioner's petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit in that certain cause determined by said Circuit Court of Appeals numbered 11040, United States of America, Appellant vs. 24 cans containing a total of approximately 1833 pounds of ladled butter in possession of Cloverleaf Butter Company, Birmingham, Alabama, et al., Appellees,

by which the judgment of the District Court for the Northern District of Alabama was reversed. As grounds for said motion, petitioner assigns the following, separately and severally to-wit:

1. Petitioner is, and had been for many years when the libels of the packing stock butter in question were instituted, engaged in the business of manufacturing process or renovated butter under Act of May 9th, 1902 (Chap. 784, Sec. 5, 32 Stat. 194-197) as amended August 10th, 1912 (37 Stat. 273) and re-adopted as Sections 2320-2327 Internal Revenue Code, known as the Renovated Butter Act. The subject matter of the libels is packing stock butter acquired, transported and held by petitioner solely for processing same under said Act.

The process or renovated butter industry is a substantial one. The product is made by extracting the butter oil from butter produced by small farmers in the Southeastern States who have no other market for the surplus over their domestic needs, and is known in the trade as packing stock butter. This country butter does not measure up to the standards of the Food, Drug and Cosmetics Act when sold by the producer.

The sole function of the process or renovated butter industry is to remove impurities and excess moisture in the country butter and make the *finished* product comply with the standards of the Federal Food, Drug and Cosmetics Act.

If the Food, Drug and Cosmetics Act is to be applied to the packing stock, the result will be that *every* lot of country butter will be subject to seizure and condemnation and all parties participating in shipments of such butter in interstate commerce will be subject to prosecution and penalties provided by the Food, Drug and Cosmetic Act. The renovated butter industry has operated since 1902 under the supervision and control of the Secretary of Agriculture and regulations promulgated by him as definitely provided

in the Renovated Butter Act. The scheme of the Renovated Butter Act and Regulations promulgated by the Secretary of Agriculture look to a thorough and efficient clarifying, pasteurizing and processing of butter oil drawn from the packing stock and a wholesome *finished* product under the control of the Secretary of Agriculture which would otherwise be lost. The test of the suitability of the raw material being the condition of such finished product. If the finished product is in any manner violative of the Food, Drug and Cosmetics Act, it is subject to seizure and condemnation and the shipper to the penalties as provided in that Act.

The Food, Drug and Cosmetics Act, as construed, does not recognize any salvage business. It has been held in the recent decisions such as *U. S. v. 52 Drums Maple Syrup*, (CCA 2nd Circuit) 110 Fed. (2) 914, that any component part of food not then meeting the requirements of that Act must be condemned; that the intention and undisputed ability to process the material so as to make it pure before it reached the public is immaterial. The only right to use such material being after seizure and condemnation, order of the Court to that end, payment of the costs, giving bond and defraying the expenses of a representative of the administrator during the operation. No business can operate when all of its raw material is subject to such restrictions, expense and delay to say nothing of the liability to fine and imprisonment in the case of every interstate shipment of such raw material.

2. The Circuit Court of Appeals in the decision sought to be reviewed, held in effect that the Food, Drug and Cosmetics Act applies to the packing stock butter, and that if the same be adulterated as defined in that Act, it must be condemned and that the Renovated Butter Act and its standards afforded no defense, regardless of the fact as that Court declared that the renovating process is well adapted

to remove all impurities and that renovated butter is good butter.

3. The Renovated Butter and Food, Drug and Cosmetics Acts have not been construed by this Honorable Court in any case wherein the point here involved has been presented.

The question vitally affects not only this petitioner, but every other manufacturer of process or renovated butter and the producers of the raw material. If the country butter cannot be transported without violating the law and the material confiscated, this being the only source of supply, the industry which for over 40 years has filled a public need, must go out of business.

4. The question as to whether the use of packing stock butter is to be determined by the standards of the Special Renovated Butter Act governing that industry, and the comprehensive regulations promulgated thereunder and the duties enjoined upon the Secretary of Agriculture, by which the final test is the wholesomeness of the finished product or by the provisions and standards of the Food, Drug and Cosmetics Act (a general law) which requires all component parts of food not in their then condition free from contamination to be condemned regardless of what will be accomplished by processing—must eventually be decided by this Honorable Court.

It is respectfully submitted that delay can only result in confusion and uncertainty.

5. The plight of the renovated butter industry is not fanciful, but real. If the decision of the Circuit Court of Appeals is to stand as the law, then the consequences of continued engaging in business would be ruinous.

The fact that during the period between July 1, 1933 and January 1, 1942, 36 seizures were made of packing stock butter (some of which being here involved) was urged by the Solicitor General as showing that the business

would not be seriously affected by seizure of *some* packing stock. There can be no middle ground. The industry is either subject to the Renovated Butter Act as regards the packing stock, or to *all* of the provisions of the Food, Drug and Cosmetics Act relating to all component parts of food; it cannot be thus regulated in part under one act and in part under the other. It should not be forced to exist merely by the grace of administrators who come and go or vacillate in their administration.

These previous comparatively insignificant seizures were doubtless in a way test cases. If this Honorable Court permits the decision of the Circuit Court of Appeals to stand, no one connected with the industry will know what his rights and responsibilities are. Undoubtedly, the case will be urged as a construction of the Act requiring the seizure of all packing stock butter that is contaminated in the slightest degree, and entirely displace the authority and duty of the Secretary of Agriculture under the Renovated Butter Act which requires him to cause a rigid sanitary inspection to be made of all process butter factories, and of the products thereof and the materials going into the same and empowers him to ascertain whether or not materials used in the manufacture are deleterious to health or unwholesome in the finished product, and if so found to confiscate the same. (I.R.C. Sec. 2325.)

If the raw material should be condemned under the Food and Drug Act, prosecution for continued transportation necessarily follows.

6. The construction of the Renovated Butter and Food, Drug and Cosmetics Acts, as declared by the Circuit Court of Appeals, is not only erroneous, but contrary to the rules of statutory construction as often declared by this Honorable Court.

7. The construction of the Renovated Butter Act as made by the Circuit Court of Appeals entirely disregards

the terms of that Act as well as its history, objects and purposes.

Respectfully submitted,

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ERLE PETTUS

VICTOR H. SMITH

All of Birmingham, Ala.

*Attorneys for Petitioner*

#### CERTIFICATE

The undersigned counsel for Petitioner hereby certify that the foregoing Petition is filed in good faith and not for delay.

This November 2nd, 1945.

HORACE C. WILKINSON

ERLE PETTUS

VICTOR H. SMITH

*Attorneys for Petitioner*

